Has the CJEU just Reconfigured the EU Constitutional Order?

verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/

Michal Ovádek Mi 28 Feb 2018 Mi 28 Feb 2018

On 27 February 2018 the Grand Chamber of the Court of Justice of the EU (CJEU) handed down a judgment in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*. The case concerned a legal challenge of the Portuguese association of judges against austerity measures temporarily reducing the salaries of public sector workers. The case attracted merely three observations but the CJEU may have used it to potentially reconfigure a long-standing compromise underlying the EU constitutional order.

A tenuous material link

As is well-known, a foundational principle governing the relationship between EU and national law relates to the extent to which a given national measure comes within the *material* scope of EU law. The material scope of EU law is particularly relevant when assessing the question whether EU fundamental rights and principles apply to situations arising at the national level. In short, the applicability of EU law and procedure often crucially depends on the existence of a material link with the domestic situation. This *ratione materiae* criterion essentially serves to prevent EU law from extending into domestic matters beyond the limits envisaged in the EU Treaties and is clearly a constitutional feature of the EU system.

In the part of the judgment setting out the applicable law in the dispute, there are no references to substantive EU law, however. The only provisions listed are Article 2 TEU containing EU values and Article 19 TEU which states in the relevant part that:

> The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The subsequent reference is to the Portuguese law providing for the temporary reduction in salaries of public sector employees, which is at the heart of the domestic proceedings from which the preliminary reference originates. Is this not a purely domestic situation?

What in the view of the referring court, and seemingly of the CJEU, makes the interpretation of the Portuguese law come within the ambit of EU law is that the austerity measures were adopted in response to demands attached to EU financial assistance. The relevant passage is rather vague (‘European in origin’).

> According to the referring court, the measures for the temporary reduction in the amount of public sector remuneration are based on mandatory requirements for reducing the Portuguese State's excessive budget deficit during the year 2011. It considers that those measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those requirements were imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.

The entire judgment, in fact, contains no specific reference to the EU measures which purportedly imposed in some way the obligation to adopt the specific austerity measures at issue in the main proceedings. It is worth recalling that the CJEU was a lot more pedantic on this point in last year's *Florescu* where it was held that an EU measure 'contains no specific provision requiring the adoption of the national legislation at issue in the main proceedings', even though the Court ultimately still found that Romania was implementing EU law for the purposes of Article 51(1) of the Charter.

The thrust of the case at hand would therefore be consistent with *Florescu*. However, without an analysis of the material link between the relevant EU law (actually, without even specifying what the relevant EU law was!) and national law, it is difficult to say how far that link was stretched. Was the tenuous material link not analysed in more detail on purpose in order to allow the subsequent pronouncement?

The many scopes of EU law

The CJEU begins by distinguishing the scope of EU law referred to in Article 19(1) TEU from the requirement that Member States must be 'implementing Union law' for the EU Charter of Fundamental Rights to be applicable (Article 52(1) CFR). Regarding the latter, there was some discussion following the adoption of the EU Charter whether the scope of the Charter was meant to be different than the scope of applicability of general principles of EU law (which include fundamental rights). The CJEU sensibly held, notably in Fransson, that the two were to have the same scope, thus precluding considerable confusion over which overlapping principles apply when.

In the case at hand, the Court insinuates that the scope of application of Article 19(1) TEU, which refers 'the fields covered by Union law' is broader than the scope of 'implementing Union law'. The CJEU does not elaborate on this but this is a potentially ground-breaking finding. It can mean, in essence, that there are certain obligations flowing directly from Article 19(1) TEU which do not require the Member States to be implementing or acting within the scope of EU law in the traditional sense. While it is unclear what the 'fields covered by Union law' are, the broad interpretation adopted in this case – seeing how vague and tenuous the link between EU and national law was – suggests that Article 19(1) TEU will be able to reach far into domestic territory. The Court might be laying the groundwork for something bigger.

The CJEU subsequently gives a strong show of support to Article 2 TEU and the rule of law. Article 19 TEU is held to give 'concrete expression to the value of the rule of law stated in Article 2 TEU'. In this way, the Court operationalizes the values of Article 2 TEU which is further reinforced with a reference to Article 4(3) TEU on the principle of sincere cooperation. Here it should also be remembered that it has been subject of some dispute

whether Article 2 TEU can only be enforced through the special political procedure of Article 7 TEU, given that there is in principle no limitation on the material scope of applicability of EU values. The Court appears to be trying to tap into this resource to bolster the argument that EU law requirements concerning judicial independence at national level cannot be confined to situations in which the EU acquis is applicable.

Moreover, the CJEU reaffirms that the principle of effective judicial protection is a general principle of EU law. However, as stated above, the Court alters the scope of application of Article 19(1) TEU and takes it beyond the traditional scope of general principles (which may lead to some confusion that was avoided when it came to interpreting the scope of application of the Charter). In addition, contrary to the opinion of the Advocate General, the CJEU infuses Article 19 TEU and the principle of effective judicial protection enshrined therein with the principle of judicial independence, drawing inter alia on Article 47 CFR and the case law on Article 267 TFEU. Of course, the Court is not really able to use Article 47 CFR as a legal source due its apparently narrower scope of application.

Not really about Portuguese judges' salaries

Of the 25 paragraphs of the substance of the judgment, only 8 are actually concerned with the remuneration of Portuguese judges. The rest is devoted to emphasizing the essential importance and mutual reinforcement of the rule of law, effective judicial protection, judicial independence, mutual trust, sincere cooperation and the decentralized enforcement of EU law by national courts. This cannot be a coincidence: the CJEU is sending a signal to Poland (and others) and preparing for future engagement with what could possibly be independent Polish courts.

The message is clear: when it comes to judicial independence and effective protection, the EU cannot stop at the traditional limits posed by the material criterion which normally delineates the respective spheres of EU and national law. The judgment also strengthens the Commission's case in the ongoing dialogue with Poland concerning the undermining of the rule of law and judicial independence by the government and any future action based on Article 7 TEU or infringement proceedings. Prompted by a deteriorating rule of law environment, the CJEU has potentially reconfigured the EU constitutional order, nudging it in the direction of a political union based on common values.

SUGGESTED CITATION Ovádek, Michal: *Has the CJEU just Reconfigured the EU Constitutional Order?, VerfBlog,* 2018/2/28, https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/.